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In the Supreme Court of the United States

OCTOBER TERM, 1975

HYMAN RADZANOWER, PETITIONER

v

TOUCHE ROSS & CO., ET AL. DEFENDANTS, AND FIRST NATIONAL BANK OF BOSTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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OPINIONS BELOW

Neither the United States Court of Appeals for the Second Circuit nor the United States District Court for the Southern District of New York rendered any opinion.

JURISDICTION

The judgment of the District Court granting the motion of respondent First National Bank of Boston to dismiss the action as to it for improper venue was entered on October 21, 1974 (App. 89a). The Court of Appeals affirmed that judgment on May 23, 1975 (App. 94a).

Plaintiff below filed a Petition for a Writ of Certiorari with this Court on August 20, 1975, and this Court granted the petition on October 20, 1975. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the narrow venue provision of the National Bank Act requires the dismissal, for improper venue, of an action against a national bank arising under the Securities Exchange Act of 1934, where there is conformity with the subsequently-enacted venue provisions of the latter Act.

STATUTES INVOLVED

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> The district courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction over violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal action may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district wherein the defendant is found or is an inhabitant or

> transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant * * *.

The venue provision of the National Bank Act, 12 U.S.C. 94, which derives from the National Banking Act of 1863, 12 Stat. 665, provides:

> Actions and proceedings against any association under this Chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

STATEMENT

On July 16, 1974, petitioner instituted a class action in the United States District Court for the Southern District of New York, alleging that the First National Bank of Boston (herein the "Bank") and several other defendants had violated, *inter alia,* the Securities Exchange Act of 1934 in connection with transactions in the securities of Teleprompter Corporation (App. 1a, 13a–25a). The Bank was alleged to have engaged in such violations while conducting banking business in the State of New York (App. 14a). Jurisdiction for the action was based on Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa (App. 14a). The Bank moved in the District Court to dismiss the action as to it on the ground that, as a national banking association organized under the National Bank Act, it may be

sued only in the judicial district in which it was "established," 12 U.S.C. 94[1] (App. 59a).

The district court agreed that venue was not proper in New York, and dismissed the action as to the Bank. On May 23, 1975, the court of appeals, after oral argument on behalf of the respective parties, affirmed the district court's decision from the bench, without opinion.

THE INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

When the Commission deems that any person is violating or is about to violate provisions of the federal securities laws or rules or regulations thereunder, it is empowered to bring suit to enjoin such activities.[2] The venue provisions of the federal securities laws[3] apply to enforcement actions brought by the Commission as well as to private litigation in which viola-

[1] Plaintiff had opposed that motion on the ground that the Bank had waived the venue provisions of the National Bank Act by doing business in New York and by designating the New York Superintendent of Banks to receive service of process for it in connection with that business, as required by New York law, but the district court found that there was no waiver.

[2] See, *e.g.*, Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b); Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(e).

[3] See Section 22 of the Securities Act of 1933, 15 U.S.C. 77v; Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa; Section 25 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79y; Section 322 of the Trust Indenture Act of 1939, 15 U.S.C. 77vvv; Section 44 of the Investment Company Act of 1940, 15 U.S.C. 80a–43; and Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–14.

tions of the securities laws are alleged. The decisions of the courts below, if affirmed by this Court, would have an adverse effect upon the Commission's enforcement activities—a result the Commission believes Congress did not intend. For example, if the venue provisions of the National Bank Act should be held to prevail, the Commission would be precluded from bringing a single enforcement action against all who have committed violations of the securities laws arising out of the same facts if one of the proposed defendants should be a national banking association established in a district where venue might not lie under the securities laws for each of the others. Unless the Commission should forego the action against the bank, it would be required to institute two or more[4] separate actions on essentially the same facts, which would entail a needless expenditure of additional time and resources. Apart from the duplication of effort by the Commission and the courts, there would be other inconveniences. Thus, if the district court in which venue lies as to a defendant national bank should be over 100 miles from the district in which witnesses are located, such witnesses could not be compelled to appear.[5]

[4] *Cf. Levin* v. *Great Western Sugar Company*, 274 F. Supp. 974, 977 (D.N.J.), involving the conflict between the venue provisions of the securities laws and the National Bank Act, where "[t]he moving banks [were] California, Massachusetts, Illinois, and Colorado national banks * * *."

[5] Rule 45(e) of the Federal Rules of Civil Procedure.

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Moreover, specific provision is made in the securities acts for private causes of action for damages,[6] and the courts have implied other private causes of action based on violations of the statutes and rules thereunder.[7] This Court has noted that these private actions for damages provide "a necessary supplement to Commission action." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382. If the venue provision of the National Bank Act should prevail, the increased difficulty and costs involved in bringing such actions against national banks which violate the securities laws might mean that, as a practical matter, suit in many instances could not be maintained against a bank.

SUMMARY OF ARGUMENT

The venue provisions of the Securities Exchange Act are in direct and irreconcilable conflict with the venue provision of the National Bank Act when a national bank is alleged to have committed a securities violation, and in such a situation the provisions of the Securities Exchange Act, as the later-enacted statute, should control—particularly where the policy of the later Act would be frustrated. That this was the intent of Congress in enacting the Secu-

[6] See, e.g., Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. 77k, 771; Sections 9(e), 16(b) and 18(a) of the Securities Exchange Act, 15 U.S.C. 78i(e), 78p(b) and 78r(a).

[7] See, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426. This Court has noted that "[i]t is now established that a private right of action is implied under § 10(b)" of the Exchange Act. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13, n. 9.

rities Exchange Act is suggested by Congress' concern at that time with abuses by banks in securities transactions. By contrast, the policy underlying the venue provision of the National Bank Act, *i.e.*, that banks should not have to transport their records substantial distances, was, by reason of technological advances in communication, document reproduction, and transportation, of only minor significance when the Securities Exchange Act was enacted.

ARGUMENT

THE VENUE PROVISIONS OF SECTION 27 OF THE SECURITIES EXCHANGE ACT SUPERCEDE THE LIMITED VENUE PROVISION OF THE NATIONAL BANK ACT

A. SINCE THE VENUE PROVISION OF THE NATIONAL BANK ACT AND THE VENUE PROVISIONS OF THE SECURITIES EXCHANGE ACT ARE IN DIRECT AND IRRECONCILABLE CONFLICT, THE LATER ENACTED STATUTE SHOULD CONTROL

There can be little doubt that the restrictive venue provision of the National Bank Act is in direct conflict with the more liberal venue provisions of the Securities Exchange Act and that, with respect to suits against national banks under the latter Act, it is not possible to construe both laws in a way that reconciles them and gives effect to each. If the venue provisions of the Securities Exchange Act prevail, plaintiff's suit may be maintained in the Southern District of New York, where it was instituted, and where venue is proper as to the other defendants. If the provision of the National Bank Act governs, the suit cannot be maintained against the

defendant Bank in that district but must be brought in the District of Massachusetts, where the Bank is "established,"[8] and in which district it may be questionable whether venue is proper with respect to all the other defendants.

The usual presumption against implied repeal by a subsequently-enacted statute is inapplicable here, where the conflict is clear and irreconcilable. In such cases, this Court has stated, "the later act to the extent of the conflict constitutes an implied repeal of the earlier one * * *." *Posedas* v. *National City Bank of New York*, 296 U.S. 497, 503. In conformity with this rule, the Court of Appeals for the Third Circuit, in *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 483 F. 2d 852, determined that the venue provisions of the Securities Exchange Act should be deemed a *pro tanto* repeal of the conflicting venue provisions of the National Bank Act.

This Court has considered the issue of implied repeal of the federal antitrust laws in the context of a variety of regulatory schemes and procedures. Most recently, the Court held that the earlier antitrust laws were repealed to the extent necessary to make the regulatory scheme established by Congress in the federal securities laws work where the policies of

[8] The district in which a bank is deemed "established" under 12 U.S.C. 94 has been held to be the district in which it has its principal place of business as recited in its charter. *Leonardi* v. *Chase National Bank*, 81 F. 2d 19 (C.A. 2), *certiorari denied*, 298 U.S. 677; *Buffum* v. *Chase National Bank*, 192 F. 2d 58 (C.A. 7), *certiorari denied*, 342 U.S. 944.

these two statutory schemes were in conflict. In *United States* v. *National Association of Securities Dealers, Inc.*, No. 73-1701 (June 26, 1975), the Court had under consideration certain restrictive agreements between underwriters and broker-dealers with respect to trading in mutual fund shares which "normally would constitute *per se* violations of § 1 of the Sherman Act." The Court found, however, that there was no way to reconcile the authority given the Securities and Exchange Commission by Congress in Section 22(f) of the Investment Company Act of 1940, 15 U.S.C. 80a-22(f), to permit such restrictive agreements with the Sherman Act's declaration that they are illegal per se. The Court concluded that "[h]ere implied repeal of the antitrust laws is 'necessary to make the [regulatory scheme] work.'" —— U.S. at ——, 43 U.S.L.W. at 4981.

Similarly, in *Gordon* v. *New York Stock Exchange*, No. 74-304 (June 26, 1975), this Court held that implied repeal of the antitrust laws was necessary to give effect to the legislative provisions of the Securities Exchange Act wtih respect to Commission supervision of exchange commission rates. The "axioms of construction" which these and similar earlier cases have "clearly established," this Court there stated, are that "repeal of the antitrust laws by implication is not favored and not casually to be allowed," but "where there is a 'plain repugnancy be-

tween the antitrust and regulatory provisions' " repeal will be implied.[9]

Similarly, it has been held that even general procedural requirements subsequently enacted will prevail over specific but clearly inconsistent prior procedural provisions. Thus, in *Elof Hansson, Inc.* v. *United States,* 178 F. Supp. 922, 926 (Cust. Ct.), *rev'd on other grounds,* 296 F. 2d 779 (C.A. 3), *certiorari denied,* 368 U.S. 899, a three-judge court held that the general rulemaking provisions of the Administrative Procedure Act supersede the specific procedural provisions relating to the sale of foreign commodities within the United States set forth in the Antidumping Act of 1921, because it was found that "the provisions of [the] two acts are irreconcilable, * * *" and, accordingly, "the later statute repeals the earlier one to the extent of the conflict." [10]

[9] See also, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350–351; *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 126; *Hughse Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385–389; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–218; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357–358; *United States* v. *Borden Co.*, 308 U.S. 188, 198–199.

[10] The Administrative Procedure Act itself, despite a provision in Section 12 thereof, 5 U.S.C. 559 (formerly 5 U.S.C. 1011), that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this * * * [Act] except to the extent that such legislation shall do so expressly," has been held to be overruled by the Deportation Act of 1952, insofar as the latter statute provided an "exclusive procedure for determining deportability of an alien," even though no reference to the Administrative Procedure Act was made. *Marcello* v. *Ahrens*, 212 F. 2d 830 (C.A. 5), *affirmed sub nom. Marcello* v. *Bonds*, 349 U.S. 302.

In the instant case, the conflicting venue provisions of the two statutes involved cannot be reconciled but are "repugnant" in both their policies and in their practical effects. The venue provision of the National Bank Act is a provision designed for the convenience of national banks (see discussion *infra,* pp. 14–15); the venue provisions of the Securities Exchange Act, on the other hand, are an integral part of a law designed to favor plaintiffs, including this Commission, bringing actions under the Securities Exchange Act to ensure that all defendants involved in a multi-party, multi-state fraud could be joined in one suit in one court. And in the practical effect of the application of these two statutes, the conflict is most clear.

The Bank argues that "[t]his Court has specifically held that where particular venue provisions have been enacted by Congress, the broader language of a general statute does not supersede the specific legislation even though it may be literally applicable." [11] The purported distinction, however, is not valid. The venue provisions of the Securities Exchange Act are not general but special, as the courts have noted.[12] Although they are not confined to one kind of defendant, as is the venue provision of the National Bank Act, they

[11] Brief in Opposition to the Petition for a Writ of Certiorari, at page 8.

[12] *Black & Company* v. *Nova-Tech, Inc.*, 333 F. Supp. 468, 473 (D. Ore.); *Securities and Exchange Commission* v. *Wimer*, 75 F. Supp. 955, 961 (W. D. Pa.); *Lorenz* v. *Watson*, 258 F. 2d 724, 729 (E. D. Pa.).

are confined to one type of action, that is, an action arising under the federal securities laws.[13]

B. THE POLICIES UNDERLYING THE VENUE PROVISIONS IN ISSUE HERE REQUIRE THE APPLICATION OF THE SECURITIES EXCHANGE ACT PROVISIONS.

As this Court has consistently stated, the provisions of the federal securities laws, "enacted for the purpose of avoiding frauds," must be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (Investment Advisers Act of 1940); *accord, Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (Securities Exchange Act); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (Securities Exchange Act); see *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353–354 (Securities Act); *Superintendent of Insurance* v.

[13] Indeed, in *Burd* v. *McCullough*, 217 F. 2d 159 (C.A. 7), the court characterized one statute relating to the nature of the action as being "limited to a specific situation," while characterizing another statute relating to the type of person involved in the lawsuit as being "general." That case involved two Indiana statutes, analogous to the two federal statutes here involved—an earlier statute relating to the type of person involved and a conflicting later statute relating to a particular type of action. The earlier statute provided that persons acquiring causes of action during their minority could bring such actions within two years of attaining their majority. The later statute precluded any malpractice action for damages unless "filed within two years from the date of the [allegedly wrongful] act * * *" The court held that under applicable principles of statutory construction, the later controlled.

Bankers Life & Casualty Co., 404 U.S. 6, 12 (Securities Exchange Act). The broad remedial purpose of these laws is clearly set forth in their respective legislative histories. The Securities Exchange Act of 1934 was enacted in response to "the speculative orgy of 1928 and 1929," S. Rep. No. 1455, 73d Cong., 2d Sess. 81 (1934), and a presidential call for securities "legislation [that] has teeth in it." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 2 (1934). Necessarily, Congress recognized the national rather than local nature of the problems involved in this area and the fact that the law's remedial provisions would have to be complementary.[14]

The provision that venue for actions arising under the securities laws may lie in several alternative districts exemplifies the liberal approach taken in these statutes. As one court has noted, one of the purposes of Section 27 of the Securities Exchange Act is "to do away with limitations on venue. * * *" *Fistel* v. *Beaver Trust Co.*, 94 F. Supp. 974, 976 (S.D.N.Y.). As indicated in the Conference Report on the Securities Act of 1933, H.R. Rep. No. 152, 73d Cong., 1st Sess. 27 (1933), Congress explicitly displayed its concern with the scope of the venue provisions of that Act. The House bill, H.R. 5480, "limited the venue of actions brought * * * to enforce civil liabilities * * * to the district in which the defendant was an in-

[14] The Securities Exchange Act was intended to cover "a wide field," since none of the evils which the legislation aims at could "be isolated for cure of itself alone." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

habitant or had its principal place of business or in the district where the sale took place. The Senate amendment extended this provision to permit suit in the district where the defendant might be found or where he transacts business." The legislation adopted incorporated the Senate provision. Thus, in the case of business entities, venue was enlarged to include not only the district where the principal office of the defendant was located, as specified in the National Bank Act, but to reach other districts as well. And, as noted *supra,* note 3, provisions for expanded venue were included in each of the subsequently-enacted securities laws.

The Congressional policy embodied in the federal securities laws is fully as vital today as when those laws were first enacted, if not more so. The Conference Report on legislation which enacted far-reaching amendments to the Securities Exchange Act several months ago stated: "The basic goals of the Exchange Act remain salutory and unchallenged: To provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors. * * *" H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 91 (1975).

By contrast, the policy underlying the enactment of the venue provision of the National Bank Act in 1863 can today only be considered of minor significance. The restrictive venue provision contained in the National Bank Act has its roots in the National Banking Act of 1863, 12 Stat. 665, replaced a year later by

the Act of 1864, 12 Stat. 99. By Section 11 of the 1863 Act, the banking associations were given general corporate powers, among them the power to "sue and be sued * * * in any court of law or equity as fully as natural persons." Section 59 of that Act provided that suits by and against any association under the Act could be had in any federal court held within the district in which the association was established.[15] This provision has continued in effect to the present, appearing today as 12 U.S.C. 94.

This Court has observed that this limited venue provision was "prescribed for the convenience of those institutions [i.e., national banks], and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. * * * *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 561–562, n. 12. See also *Bank of Bethel* v. *Pahquioque Bank,* 14 Wall. 383, 394; *Crocker* v. *Marine National Bank,* 101 Mass. 200; *Chaffee* v. *Glens Falls National Bank & Trust Co.,*

[15] The next year, in Section 57 of the Banking Act of 1864, 13 Stat. 116–117, Congress expressly permitted banks to be sued in state courts, while carrying forward the venue provision with respect to suits in federal courts. The venue provision was omitted from Title 62 (National Banks) of the Revised Statutes of 1873, but at the time there was included in Section 563 of Title 13 (The Judiciary) provisions derived from Section 57 of the 1864 Act granting the federal courts jurisdiction over suits by and against national banks brought in the district of their residence. In 1875, Title 62 was amended by the Act of February 18, 1875, 18 Stat. 320, by adding provisions to Section 5198 of Title 62 substantially identical to Section 57 of the 1964 Act. The portion of Section 5198, Rev. Stat. (1878), derived from Section 57 of the 1864 Act, has been codified as 12 U.S.C. 94.

204 Misc. 181, 123 N.Y.S. 2d 635, *affirmed,* 283 App. Div. 694, 128 N.Y.S. 2d 539; T Michie, *Banks and Banking* (Willson et al. eds.), § 220a(4) (1973). Indeed, as this Court has explained, the only reason for the National Bank Act venue provision is "the convenience of the bank." *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 562, n. 12.

We submit that the convenience of a bank is not a weighty consideration when contrasted with the congressional policy which is expressed in the federal securities laws. As stated in *Carpenter* v. *Hall,* 352 F. Supp. 806, 810 (S.D. Tex.), "modern facilities for reproduction and transportation could not have been imagined" in the last century. "Today Xerox-type copy machines are as readily available as typewriters, and no two cities are as much as half a day apart." [16] Similarly, another court has noted that the inconvenience and interruption of a bank's business which would have resulted in the mid-nineteenth century if banks were subject to jurisdiction in courts located in places other than where they were established

> * * * have today been mitigated, if not, in fact, minimized, by present modes of rapid transportation and communication and by mechanical and electronic accounting systems and photostatic and microfilming processes, among others, and the present pretrial practice and liberalization of the rules respecting documentary evidence have further eased the burden incident to litigation in which banks may be involved. Thus the supposed objective of the statute has been in large part attained through other means.

Chaffee v. *Glens Falls National Bank & Trust Co.,* 123 N.Y.S. 2d 635, 638 (Sup. Ct.), *affirmed,* 128 N.Y.S. 2d 539 (App. Div), *appeal denied,* 129 N.Y.S. 2d 237. The same court went on to note that, in modern times, "* * * the activities of even the smallest banks have expanded far beyond the limits of the cities and villages in which these banking houses are located," and a rule that banks can only be sued in their place of establishment is today "unnecessarily harsh."

In contrast, as noted in *Carpenter, supra,* 352 F. Supp. at 810, "the national impact of securities fraud, a by-product of modern communication technology, was already a major threat when Congress passed the 1933 and 1934 Acts." This fact was not unnoticed by the Congress when it was considering the legislation which became the Securities Exchange Act. While observing that in former years, securities transactions were carried on by relatively few people, in recent years, "due largely to development of the means of communication—the expanding network of telephone, telegraph, ticker, radio, and newspaper facilities—the

[16] The limited venue provision of the National Bank Act, as the Court of Appeals for the Third Circuit noted, has been the subject of "severe criticism," *Ronson Corp., supra,* 483 F. 2d at 855. The American Law Institute, Study of the Jurisdiction Between State and Federal Courts (1969) p. 412–413, has recommended repeal, observing that "[t]here is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purpose of venue." *See also* "An Assault on the Venue Sanctuary of National Banks," 34 Geo. Wash. L. Rev. 765 (1966).

entire Nation has become acutely sensitive to the activities of securities exchanges."[17] Accordingly, it found that "[t]ransactions in securities on organized exchanges and over-the-counter markets are affected with a national public interest," requiring regulation.[18]

Thus, the Court of Appeals for the Third Circuit, in holding that the venue provisions of the Securities Exchange Act supersede that of the National Bank Act, was "guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities markets and of affording proper disclosure to the investing public, as well as preventing fraud in securities trading." *Ronson Corporation v. Liquifin Aktiengesellschaft,* 483 F. 2d 852, 854. And while the Court of Appeals for the Second Circuit has held the National Bank Act venue provision to be controlling, it did so only "with regret," conceding that its decision meant "heavy inconvenience for the plaintiff and a burden for the federal courts, as against the burden on [the bank]—slight in this age of cheap long-distance telephone rates, efficient methods for copying documents and jet air transport—of defending an action in New York rather than in Chicago." *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.,* 344 F.2d 300, 301, 302–303, *certiorari denied,* 393 U.S. 855.

In *Bruns, Nordeman and Company,* the leading case holding the National Bank Act venue provision con-

[17] S. Rep. No. 1455, 73d Cong., 2d Sess. 5 (1934).

[18] *Id.* See also Section 2 of the Securities Exchange Act, 15 U.S.C. 78b.

trolling, the court expressed the opinion that there had been no intent on the part of Congress to carve out an exception to the older National Bank Act limitation on venue because there was nothing in the legislative history of the venue provisions of the Securities Act or the Securities Exchange Act which explicitly indicated any consideration of the status of national banks. 394 F. 2d at 304. The court further opined that national banks "were hardly envisioned" by the Congress "as likely defendants in actions under the new securities laws."

Two courts which have subsequently considered the matter have strongly disagreed with these conclusions. See *Ronson Corporation, supra,* 483 F. 2d at 854; and *Carpenter* v. *Hall, supra,* 352 F. Supp. at 811 (S.D. Tex). The *Bruns Nordeman* court was apparently unaware that a single report of the Senate Committee on Banking and Currency was presented to the Senate at about the time the Securities Exchange Act was passed, dealing with both securities industry practices and banking activities.[19] The report detailed

[19] Report of the Committee on Banking and Currency, S. Rep. No. 1455, 73d Cong., 2d Sess (1934). This resulted from a resolution in the 72d Congress "to investigate practices of stock exchanges with respect to the buying and selling and the borrowing and lending of listed securities," and from resolutions in the 73d Congress "to investigate the matter of banking operations and practices, transactions relating to any sale, exchange, purchase, acquisition, borrowing, lending, financing, issuing, distributing, or other disposition of, or dealing in, securities or credit by any person or firm, partnership, company, association, corporation, or other entity, with a view toward recommending necessary legislation under the taxing power or other federal powers."

various abuses on the part of investment [20] and commercial banks [21] in connection with transactions in securities. Commercial banks were found to have violated their fiduciary duties to depositors, stockholders and investors by such practices as improperly promoting to their depositors, who were seeking disinterested investment counsel from their bankers, securities in which the bank or their affiliates had a pecuniary interest.[22] Banks employed, through investment affiliates, "many salesmen throughout the Nation to quickly sell the securities issues" they were promoting.[23] Commercial banks used their affiliates "not only to circumvent the law forbidding banks to purchase and sell their own capital stock, but to participate in speculative ventures in such capital stock." [24] Banks and their officers and other insiders organized pool operations [25] to manipulate their own stock, and did not hesitate to sell that stock short when profits could be made by so doing.[26] Bank officers held numerous directorships in various public companies and often "assumed the inconsistent position of representing conflicting interests when passing upon loans" to corporations in which

[20] S. Rep. No. 1455, 73d Cong., 2d Sess. at 83–153.
[21] *Id.* at 155–229.
[22] *Id.* at 163.
[23] *Id.* at 166.
[24] *Id.* at 168.
[25] The report defines a pool operation as a manipulative device involving an agreement between several people actively to trade in a single security, generally for the purpose of raising the price of a security and enabling the holders to unload their holdings at a profit upon the public attracted by the activity or the information disseminated about the stock. Such devices, the report found, were "incompatible with the maintenance of a free and uncontrolled market." *Id.* at 31.
[26] *Id.* at 192–195.

they were interested.[27] "Banking officials who were officers and directors of private corporations availed themselves of inside information of corporate condition and activities for their transactions in the corporation [sic] securities." [28] Commercial banks "consistently" made false statements of material facts to their stockholders and "issued financial statements * * * which obfuscated the true condition of the banks' affairs." [29]

These conditions then prevalent in commercial banking circles, the Congressional report observed, "cast a sombre reflection upon the ethical standards of the banking fraternity." [30] And the report concluded that only a "reawakened consciousness of the solemnity of the trust imposed upon them" could excise the predominant "moral and ethical pathology" found not only in the great financial centers but throughout the nation.[31]

Thus, contrary to the belief expressed in *Bruns, Nordeman,* Congress undoubtedly had these abuses in the banking and securities industries in mind when it passed the Securities Exchange Act, recognizing that "[s]peculation, manipulation, * * * investors' ignorance, and disregard of trust relationships by those whom the law should regard as fiduciaries" were "all a single seamless web." [32] In enacting laws designed

[27] *Id.* at 203.
[28] *Id.*
[29] *Id.* at 211.
[30] *Id.* at 214.
[31] *Id.* at 221.
[32] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934).

to provide full and fair disclosure of the character of securities sold in interstate commerce, and to prevent frauds in connection with those interstate sales, the Congress was, as noted above, being responsive to a presidential call for securities "legislation [that] has teeth in it." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 2 (1934). And, as noted by the court in *Carpenter* v. *Hall, supra,* 302 F. Supp. at 809–810, "[t]he jurisdictional and venue provisions of the federal securities laws *are* the teeth for the enforcement of this important legislation" [*emphasis supplied*]. We submit that these teeth should not be pulled out by an unduly narrow reading of the venue provisions of the Securities Exchange Act.

CONCLUSION

The judgment of the court below affirming the dismissal of the complaint as to the First National Bank of Boston should be reversed.

Respectfully submitted.

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I authorize the filing of the foregoing brief.

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